

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 6, 2009 Session

**CLARANN SLOCUM v. KENNETH D. SLOCUM v.
KAREN S. HAZELRIGG**

**Appeal from the Chancery Court for Maury County
No. 08-154 Robert L. Holloway, Chancellor**

No. M2009-00040-COA-R3-CV - Filed December 15, 2009

In this divorce action, the trial court awarded a divorce to Wife, divided the marital property, ordered the return of the down payment on the marital residence to the parties' daughter, awarded Husband's interest in the marital residence to Wife as alimony *in solido*, and awarded Wife's attorneys' fees. On appeal, Husband challenges the trial court's division of property, order to return the down payment on the marital residence to the daughter, finding regarding the value of the marital residence, award of alimony *in solido*, and award of attorneys' fees. Finding that the trial court abused its discretion in awarding attorneys' fees, the award is vacated. The trial court's order is affirmed in all other respects.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part
and Vacated in Part**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

L. Robert Grefseng, Columbia, Tennessee, for the appellant, Kenneth D. Slocum.

J. Russell Parkes, Columbia, Tennessee, for the appellee, Clarann Slocum.

Karen S. Hazelrigg, Kingston Springs, Tennessee, *pro se*.

OPINION

I. Procedural and Factual History

Clarann Slocum ("Wife") and Kenneth Slocum ("Husband") were married in 1952; they initially lived in Miami, Florida, however, Husband's position with the Air Force required them to move around. In 1968, Husband retired from the Air Force and he and Wife moved back to Miami where Husband obtained a job with AT&T (now BellSouth).

In 1995, Husband retired from BellSouth and he and Wife decided to move to Tennessee to be closer to their daughter, Karen Hazelrigg. Husband and Wife sold their home in Miami, purchased a motor home for travel, and gave power of attorney to Ms. Hazelrigg to purchase a house for them in Tennessee. Eventually, a home was purchased (“Tennessee residence”) and Husband converted the basement into an apartment, in which he and Wife lived while Ms. Hazelrigg lived in upstairs. Husband, Wife, and Ms. Hazelrigg were named on the deed to the home.

In March 1996, Husband announced that he was leaving with a car and the motor home. Wife received a call three or four weeks later from Husband saying that he was staying with some friends in Miami; Wife later learned that Husband was living with a woman and that he had started working for a company called Six R Company. At some point, Husband and his paramour moved to Texas, where they currently reside.

Ms. Hazelrigg moved out of the Tennessee residence in 1997 or 1998, but remained in Tennessee. Wife lived in the Tennessee residence until November 2007 when she went to New Mexico to stay with a friend while Wife recovered from hip surgery. Wife later moved back to Tennessee; she removed the furniture from the Tennessee residence and listed the home for sale in January 2008. The parties received an offer to purchase the Tennessee residence for \$199,000.00; the trial court found that the transaction did not close because “Ms. Hazelrigg wanted to be reimbursed [the down payment] and to receive one-third (1/3) of the balance of the equity. [Husband] wanted to receive one-third (1/3) of the entire equity.”

Wife received between \$600 and \$750 a month from Husband from the time he left in 1996 until January 2008. On March 7, 2008, Wife filed a complaint for divorce in the Chancery Court for Maury County, alleging irreconcilable differences, adultery, desertion for one year without reasonable cause, abandonment, and separation for more than two years. On March 28, Husband filed an answer and a counterclaim for divorce, alleging separation for more than two years.

On July 20, 2008, Husband filed a Motion to Amend his answer and counterclaim in order to join Ms. Hazelrigg as a party to the proceeding since she owned an interest in the marital residence. By agreed order entered on July 28, Husband’s motion was granted and Ms. Hazelrigg was added as a third-party defendant.¹

A hearing was held on December 8, 2008, and the trial court entered an order on December 10, 2008, finding, *inter alia*, that: (1) Husband committed adultery; (2) Husband had deliberately avoided accumulating assets during the time he lived with his paramour; (3) Wife, Ms. Hazelrigg and Ms. Hazelrigg’s former boyfriend made very credible witnesses; (4) Husband’s testimony that he paid the down payment on the Tennessee residence was not convincing; (5) Ms. Hazelrigg paid the down payment on the Tennessee residence at closing; (6) the parties owned the Tennessee residence as equal, one-third tenants in common; (7) Ms. Hazelrigg was entitled to the return of her

¹ On October 29, 2008, Husband filed a Motion for Default Judgment against Ms. Hazelrigg for failure to respond to the service of the complaint. The record does not contain an order disposing of that motion.

down payment on the Tennessee residence, once sold; (8) after subtracting the return of the down payment, the remaining net equity in the Tennessee residence was \$22,651.00, which entitled each party to \$7,550.33 from the proceeds; and (9) Husband's and Wife's interest in the Tennessee residence was marital property. The trial court then awarded: (1) a divorce on the ground of adultery to Wife; (2) all property in Texas to Husband; (3) Husband's BellSouth vested retirement pension, the household goods in Tennessee, and a vehicle to Wife; (4) Husband's one-third share in the Tennessee residence as alimony *in solido* to Wife; and (5) attorneys' fees in the amount of \$9,173.41 as alimony *in solido* to Wife. Husband appeals, raising the following issues:

1. Did the trial court err in its distribution of the marital property?
 - a. Is the award of funds representing a down payment to the third party, Ms. Hazelrigg, against the weight of evidence?
 - b. Are the trial court's findings regarding the value of the marital residence against the weight of the evidence?
 - c. Did the trial court err in its computations accounting for the interests of Ms. Hazelrigg?
 - d. Did the trial court err by considering improper factors and non-existent property in making its distribution?
2. Did the trial court err in making an excessive award of alimony *in solido*?
3. Did the trial court err in making an award of attorneys' fees which was excessive under the facts and circumstances of this case?

II. Standard of Review

Because this case was tried without a jury, our review of the trial court's findings of fact is *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d). Our review of the trial court's determinations regarding questions of law is *de novo* with no presumption of correctness. *See Staples v. CBL Associates, Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997).

III. Analysis

A. Down Payment on the Tennessee Residence

Husband asserts that the trial court's finding regarding the source of the down payment on the Tennessee residence was against the weight of the evidence because "the testimony of [Wife and Ms. Hazelrigg] is inconsistent and somewhat contradictory, while [Husband's] testimony is

supported by written documentation.” Husband does not argue that the trial court erred in ordering the return of the down payment on the Tennessee residence; rather, Husband only asserts that the trial court erred in its finding that Ms. Hazelrigg paid the down payment because weight of the evidence suggests that he paid the down payment and was entitled to its return. Husband’s attorney acknowledged that the issue regarding the down payment on the Tennessee residence is a factual dispute that requires a credibility determination.

At trial, Wife testified that the down payment on the Tennessee residence was paid by Ms. Hazelrigg. Ms. Hazelrigg testified that she was “100 percent sure” that she paid for the down payment on the home. Dan French, Ms. Hazelrigg’s former boyfriend, testified that, “[w]ithout a doubt,” Ms. Hazelrigg paid the down payment on the home. Husband testified that the money for the down payment on the Tennessee residence derived from the sale of his and Wife’s Miami home. In his brief on appeal, Husband asserts that the closing statement on the Tennessee residence, entered at trial as an exhibit, showed that \$36,145.13 was received from the borrower and that the borrowers listed on the statement were Husband and Wife; Ms. Hazelrigg signed their names on the statement as “atty-in-fact.” Husband also contends that his 1995 tax return, entered at trial as an exhibit, demonstrated that a \$33,919 profit² realized from the sale of the Miami home was used to pay the down payment on the Tennessee residence.³

Because the trial court observes the witnesses as they testify, it is in the best position to assess witness credibility. *Frazier v. Frazier*, 2007 WL 2416098, at *2 (Tenn. Ct. App. Aug. 27, 2007) (citing *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999)). Therefore, we give great deference to the court’s determinations on matters of witness credibility. *Id.* “Accordingly, we will not reevaluate a trial judge’s credibility determinations unless they are contradicted by clear and convincing evidence.” *Id.*

Upon a review of the record, we find that the evidence does not preponderate against the trial court’s finding that Ms. Hazelrigg paid the down payment on the Tennessee residence. There is no clear and convincing evidence in the record to contradict the court’s determination that the testimony of Wife, Ms. Hazelrigg and Mr. French that Ms. Hazelrigg paid the down payment was credible⁴; indeed, Husband does not challenge the court’s finding in that regard.⁵ The closing statement and the 1995 tax return do not show that the \$33,919 reported on the tax return as being realized as gain on the sale of the Florida residence was a part of the \$36,145.13 reflected on the closing statement

² Although Husband refers to the \$33,919 as “profit”, it is listed in the tax return as “[g]ain on sale.”

³ The tax return reflects that Husband and Wife realized a gain of \$33,919 on the sale of the Miami home and that the \$33,919 was used to lower their tax basis for the Tennessee residence.

⁴ The trial court found that Wife, Ms. Hazelrigg, and Mr. French “made very credible witnesses” and that Husband’s “testimony was impeached numerous times by prior inconsistent statements.”

⁵ In his brief on appeal, Husband states that “it is a virtual certainty that the Appellees will characterize all of these sub-issues as simply a battle of credibility, for which [Husband] is doomed to failure since the Trial Court is in the best position to evaluate such matters.”

as being received from the borrowers at the closing of the purchase of the Tennessee residence. The evidence relied upon by Husband does not preponderate against the trial court's finding that Ms. Hazelrigg was the source of the down payment or overcome the presumption of correctness we afford such finding.

B. Distribution of Marital Property

Husband asserts that the trial court erred in its division of the marital property because "some of the items awarded to [Husband] [wer]e non-existent"; specifically, Husband contends that the court's award to him of the motor home was an award of non-existent property since the "motor home was sold about three years prior to this divorce" and "'marital property' does not exist until the filing of the complaint for divorce."

Trial courts have "wide latitude in fashioning an equitable division of marital property," and their decisions will be given great weight by this Court. *Wilson v. Moore*, 929 S.W.2d 367, 372 (Tenn. Ct. App.1996). An appellate court will not overturn a trial court's division of marital property in the absence of evidence that the distribution "lacks proper evidentiary support or results from some error of law or misapplication of statutory requirements and procedures." *Herrera v. Herrera*, 944 S.W.2d 379, 389 (Tenn. Ct. App.1996) (citing *Wade v. Wade*, 897 S.W.2d 702, 715 (Tenn. Ct. App.1994)).

In its Decree of Divorce, the trial court awarded Husband "all property in Texas..., his television valued at \$6,000, any proceeds remaining from the sale of the motor home, his military pension..., and his Social Security." Contrary to Husband's assertion, the trial court did not award him the motor home, but instead awarded the *proceeds* from the sale of the motor home. Husband testified that the proceeds from the sale of the motor home were used to purchase a \$6,000 "big-screen television"; presumably, the \$6,000 television purchased by Husband from the proceeds of the sale of the motor home is the same \$6,000 television the trial court awarded Husband in the property division. Upon a review of the record, we find that the trial court's inclusion of the language "any proceeds remaining from the sale of the motor home" did not result in an inequitable division of the marital property.

Husband also contends that Wife's argument at trial that "in regard to the property division... the Court needed to do something 'to make up for the last fourteen or fifteen years'" was an improper consideration since "property division is to be made without regard to marital fault." Husband, however, does not present any evidence that the trial court's distribution of marital assets was actually based upon a consideration of marital fault. In the absence of any evidence in support of Husband's assertion, we find that the trial court did not err in its property division.

C. *Alimony in Solido*

The trial court awarded Husband's interest in the marital residence, as well as counsel fees, to Wife as alimony *in solido*. Husband contends that the award was unnecessary and unreasonable, particularly considering Wife's need and his ability to pay.

Alimony *in solido*, or lump sum alimony, "is a form of long term support, the total amount of which is calculable on the date the decree is entered, but which is not designated as transitional alimony." Tenn. Code Ann. § 36-5-121(h)(1). "The purpose of this form of alimony is to provide financial support to a spouse." *Id.* The amount and type of alimony to be awarded is within the sound discretion of the trial court in light of the particular circumstances of each case. *Riggs v. Riggs*, 250 S.W.3d 453, 456-57 (Tenn. Ct. App. 2007) (citing *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997)). The appellate courts will not alter such awards absent an abuse of discretion. *Id.* Moreover, the appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994).

While a trial court should consider all the relevant factors under the circumstances,⁶ the two most important factors to be considered are the need of the economically disadvantaged spouse and the obligor spouse's ability to pay. *Riggs*, 250 S.W.3d at 457 (citing *Robertson v. Robertson*, 76

⁶ The statutory factors are enumerated at Tenn. Code Ann. § 36-5-121(i) as follows:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i).

S.W.3d 337, 342 (Tenn. 2002)); *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001); *Oakes v. Oakes*, 235 S.W.3d 152, 160 (Tenn. Ct. App. 2007). When considering these two factors, the primary consideration is the disadvantaged spouse's need. *Riggs*, 250 S.W.3d at 457 (citing *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995); *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)). "Moreover, the fault of a spouse in precipitating a divorce is also a consideration when determining an alimony award." *Young v. Young*, 971 S.W.2d 386, 391 (Tenn. Ct. App. 1997) (citing *Aaron*, 909 S.W.2d at 410-11). "A wife whose marriage has been shattered by her husband's misconduct should not be left in a financial situation inferior to her economic situation prior to the parties' divorce." *Id.*

Husband asserts that Wife failed to show a need for alimony. In her Sworn Statement of Income and Expenses, however, Wife reported her monthly income as \$1,753.00, composed of \$1,097.00 from social security and \$666.00 in rental income,⁷ and monthly expenses of \$2,712.96, which included utilities, car maintenance, insurance premiums, personal expenses (food, clothes, etc.), and mortgage payments. Thus, evidence shows that Wife's monthly expenses exceeded her monthly income by \$959.96. In his brief on appeal, Husband contends that the amount of rental income in Wife's sworn statement is "understated as Karen Hazelrigg testified that the rent was \$800.00 a month." Assuming, *arguendo*, that the rental income was \$800.00 per month, Wife's expenses would still exceed her income by over \$800 and would continue to evidence her need. An additional \$134.00 in monthly rental income to Wife does not preponderate against the trial court's determination.

Husband also contends that Wife "candidly admitted that [the BellSouth retirement fund] would be sufficient"⁸ and consequently, an award of alimony was unnecessary. The record, however, does not support Husband's insistence. During direct examination, Wife testified that, if the trial court awarded her Husband's BellSouth retirement fund, she could "make it every month" and could "survive"; Wife never testified that the fund was "sufficient" to meet her needs. In addition, part of Wife's monthly expense was debt (other than the mortgage) that had been incurred during the marriage; she retained responsibility for this debt after the divorce. Wife's testimony in this regard and the evidence of record did not preponderate against the trial court's finding that Wife was in need of alimony.

While the trial court did not set forth in detail the specific factors it considered in determining to make the award of alimony *in solido*, we have reviewed the record and have determined that the trial court did not abuse its discretion in this regard. This was a 56 year marriage, of which Husband spent 44 years with Wife and the final 12 years with his paramour; the uncontested cause of the divorce was Husband's adultery. At the time of trial, Wife was 77 years old and Husband was 78. During the marriage, Wife had held employment in a law firm, telephone company, library,

⁷ Wife's monthly income of \$1,097.00 from social security and \$666.00 from rent actually totals \$1,763.00, however, Wife incorrectly lists the "Total Net Monthly Income" as \$1,753.00.

⁸ Wife was awarded Husband's BellSouth retirement in the division of marital property.

insurance agency and as a general administrator for a restaurant; her highest annual salary was \$35,000. In recent years, her physical condition has been deteriorating and she testified at trial that she has had two hip replacements and suffers from scoliosis of her back, arthritis and a torn rotator cuff; she requires the use of cane to walk.

Considering the evidence of record and the factors we are obliged to consider, we find that the trial court's decision to award Wife alimony *in solido* is fully supported; we proceed to discuss Husband's specific objections thereto.

1. Award of Husband's Interest in the Tennessee Residence

As a preliminary matter, both parties agree that the trial court's finding that the net equity in the Tennessee residence was \$22,651.00 was error. The parties differ on the value of the home, Husband contending that the value is \$199,000.00 and Wife contending that the value is \$180,000.00. Upon a review of the record, we agree that the evidence does not support the court's finding that the net equity in the Tennessee residence was \$22,651.00.

The parties urge this Court to set the value of the Tennessee residence. Generally, the value of marital property is relevant in the determination of an equitable division of that property. *Glanzman v. Glanzman*, 2004 WL 2791624, at *3 (Tenn. Ct. App. Dec. 2, 2004) (“[a]lthough Wife received the marital residence and many items of personal property, we cannot conclude that the trial court's division of property was inequitable without evidence of the value”); *see also Blevins v. Blevins*, 2003 WL 23094162, at *3 (Tenn. Ct. App. Dec. 30, 2003) (stating that, in regard to the division of marital property, “the trial court is free to assign the marital property a value that is ‘within the range of evidence submitted’”). Husband challenges the trial court's award of his interest in the home to Wife as alimony; other than as set forth in § III B, *supra*, he does not challenge the court's division of marital property. While the value of the Tennessee residence would be relevant to the extent the equitable division of marital property was at issue, as will be discussed below, the value of the home is not a factor in our review of the award of alimony; consequently, there is no need to set the value in order to properly review the trial court's award of alimony *in solido*.

The trial court did not award Wife a monetary judgment for alimony, but rather awarded her “[Husband's] entire one-third (1/3) interest in the house.” Having determined that an award of alimony was appropriate, it was justified in awarding her Husband's interest in the home. *See Hall v. Hall*, 1990 WL 8629, at *1 (Tenn. Ct. App. Feb. 7, 1990) (“an award to [wife] as alimony *in solido* [h]usband's interest in the marital residence” was justified pursuant to Tenn. Code Ann. § 36-5-102, under which “the court may decree to the spouse who is entitled to alimony such part of the other spouse's real and personal estate as it may think proper”). Based upon the specific facts of this case, including the fact that Wife lived in the residence until her medical condition forced her to move to a one floor apartment, that she thereafter maintained and rented out the home and the fact

that there was no testimony that Husband ever intended to return to the home after he left,⁹ we find that the trial court did not abuse its discretion in awarding Husband's interest in the Tennessee residence as alimony *in solido* to Wife.

Husband also asserts that, if this Court affirms the award of his interest in the Tennessee residence to Wife, Wife should be entitled to "the value [the trial court] ascribed to th[e] property interest (\$7550.33) [since it] was adequate to address whatever supplemental need which the Court perceived [Wife] to have" and that any "increase in the value of the marital interest be awarded to [Husband]."

Contrary to the contention of Husband, the trial court did not render an award of \$7550.33 alimony *in solido* in favor of Wife and provide that this was to be satisfied from Husband's interest in the marital residence; rather, the trial court determined that all interest that Husband had in the residence should be alimony *in solido* to Wife. Based upon our independent review of the record and consideration of the factors at Tenn. Code Ann. § 36-5-121(i) we have determined that the court did not abuse its discretion in this regard. *See Hall, supra*.

2. Attorneys' Fees

Husband asserts that the award of attorneys' fees to Wife was unreasonable in light of her need and his ability to pay after the division of marital property and award of his interest in the Tennessee residence, which Husband contends was a "roughly equal division of retirement/pension benefits, and a complete divestiture of [Husband] from any interest in the [property]." Wife argues that, even after the division of marital property, she was "still in need of additional assistance."

An award of attorneys' fees in a divorce case constitutes alimony *in solido*. *Anzalone v. Anzalone*, 2007 WL 3171132, at *7 (Tenn. Ct. App. Oct. 30, 2007) (citing *Herrera*, 944 S.W.2d at 390). When determining whether to award attorney's fees, the trial court must consider the relevant factors regarding alimony set forth in Tenn. Code Ann. § 36-5-121(i). *See Echols v. Echols*, 2007 WL 1756711, at *7 (Tenn. Ct. App. June 19, 2007). Because awards of attorney's fees are within the sound discretion of the trial court, we will not disturb the award on appeal absent an abuse of discretion. *Anzalone*, 2007 WL 3171132, at *7 (citing *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn. 2002)).

Taking into account the factors listed in Tenn. Code Ann. § 36-5-121(i), Wife's need, and Husband's ability to pay, we find that the evidence does not support a finding that Husband has the ability to pay additional alimony *in solido*. After the marital property division, Husband's monthly income was \$3,334.40, including his social security payments and his Air Force retirement fund; Wife's monthly income was \$3,364.45, including her social security payments, rental income, and

⁹ Husband testified at trial that he knew that he could return to the Tennessee residence but that he "didn't want to."

the BellSouth retirement fund.¹⁰ Weighing Wife's monthly income against Husband's as well as considering the factors at Tenn. Code Ann. § 36-5-121(i)(1), (4), and (5),¹¹ Wife has not demonstrated that Husband has the ability to pay her counsel fees. Consequently, the award of counsel fees to Wife is vacated and each party is responsible for their own fees.

III. Conclusion

For the reasons set forth above, the decision of the Chancery Court is AFFIRMED in part and VACATED in part.

Costs of this appeal are assessed against Husband for which execution may issue if necessary.

RICHARD H. DINKINS, JUDGE

¹⁰ In her brief on appeal, Wife listed her post-property division monthly income as \$2,698.45, but she omitted the income received from rental of the home.

¹¹ At trial, Husband was 78 years old, had retired from the work force, and suffered from high blood pressure, a knee replacement, Crohn's disease, and colitis.